

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN MICHAEL BURKEY

Defendant.

2:08-cr-00145-RCJ-PAL

**ORDER**

Defendant John Michael Burkey was indicted for his failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250. Burkey filed a Motion to Dismiss this count of his indictment. Magistrate Judge Peggy A. Leen issued a Report and Recommendation (#41), recommending that Burkey's Motion to Dismiss be denied. Burkey has filed Objections to the Report and Recommendation, in which he challenges the constitutionality of SORNA on nine separate grounds. (#43). The Court has considered the motions, briefs, pleadings, and oral argument on behalf of all parties and issues the following order. IT IS HEREBY ORDERED that the Magistrate Judge's Report (#41) is AFFIRMED and ADOPTED and Burkey's Motion to Dismiss (#23) is DENIED.

**I. BACKGROUND**

In 1982, Defendant John Michael Burkey was convicted of rape and aggravated burglary. In February 2000, Burkey was adjudicated a sexual offender pursuant to Ohio Revised Code § 2950.09. Burkey was ordered to register as a sexual offender every ninety days for the rest of his life in any jurisdiction in which he resides. Burkey acknowledged his lifelong obligation to register as

1 a sex offender every ninety days by signing a form entitled Explanation of Duties to Register as a  
2 Sex Offender.

3 In December 2001, Burkey was released from prison on parole. In March 2002, Burkey was  
4 imprisoned again, however, for violating parole. In December 2006, Burkey was released again.  
5 Upon his release from prison, Burkey acknowledged his duty to register as a sex offender by signing  
6 another acknowledgment that he was required to register within five days of entering any Ohio  
7 county or any state into which he traveled. Burkey registered as a sex offender in Ohio pursuant to  
8 O.R.C. § 2950.09 until September 6, 2007.

9 On September 25, 2007, Burkey failed to report to his parole officer and was declared  
10 “absconded” from parole on September 27, 2007. On October 10, 2007, Burkey was charged in  
11 Ohio for failure to register as a sex offender.

12 On March 7, 2008, Burkey was arrested by the United States Marshal’s Service in Las Vegas,  
13 Nevada on a warrant issued by the Ohio court for Burkey’s failure to register in Ohio. Deputy U.S.  
14 Marshals conducted an investigation and learned that Burkey had moved to Las Vegas in November  
15 2007 but had not registered as a sex offender in Nevada or any other state since last registering in  
16 Ohio in September 2007. As a result, Burkey was indicted for a violation of the Sex Offender  
17 Registration and Notification Act (“SORNA”), 18 U.S.C. 2250(a), for traveling in interstate  
18 commerce and failing to register as a sex offender in Nevada as required by SORNA.

19 On October 22, 2008, Burkey filed a Motion to Dismiss Count I of the Indictment, arguing  
20 that SORNA is unconstitutional on its face on nine separate grounds. (#23). First, Burkey argues  
21 that his prosecution of § 2250(a) violates his right to due process because he was not on notice of  
22 his obligation to register and he could not comply with SORNA’s registration requirement because  
23 no state had implemented a SORNA compliant registration system at the time of the alleged offense.  
24 Second, Burkey states that prosecution under § 2250(a) would violate his right to due process  
25 because he did not receive notice that he was required to register under SORNA. Third, he asserts

1 that Congress lacked the power under the Commerce Clause to enact the registration requirements  
2 contained in SORNA that requires persons convicted of sex offenses under state law to comply with  
3 the federal registration system. Fourth, Burkey asserts that § 2250(a) violates the Commerce Clause  
4 because it lacks a necessary jurisdictional element, namely that the defendant travel in interstate  
5 commerce for the purpose of failing to register under SORNA. Fifth, Burkey argues that application  
6 of SORNA's registration requirements violates the Ex Post Facto Clause of the Constitution. Sixth,  
7 Burkey asserts that SORNA violates Article I, §§ 1, 8 of the Constitution because Congress  
8 impermissibly delegated the authority to decide whether the statute applies retroactively to the  
9 Attorney General. Seventh, he argues that the Attorney General's interim rule that applies § 2250(a)  
10 retroactively to defendants like Burkey is invalid because the Attorney General did not comply with  
11 the notice and comment provisions of the Administrative Procedure Act. Eighth, he argues that §  
12 2250(a) violates the Tenth Amendment as an unconstitutional exercise of federal power of the states.  
13 Ninth, he contends that SORNA infringes his constitutional right to travel in interstate commerce.

14 On February 26, 2009, Magistrate Judge Peggy A. Leen issued a Report and  
15 Recommendation (#41), recommending that Burkey's Motion to Dismiss Count I be denied. On  
16 March 13, 2009, Burkey filed Objections to the Report and Recommendation, in which he essentially  
17 re-submitted his Motion to Dismiss, presenting the identical nine arguments that he did in his Motion  
18 to Dismiss.

## 19 **II. DISCUSSION**

20 The duties of a district court in connection with a Magistrate Judge's Report and  
21 Recommendation are set forth in Rule 59 of the Federal Rules of Criminal Procedure and 28 U.S.C.  
22 § 636(b)(1). Pursuant to 28 U.S.C. § 636(b) and Rule 59 of the Federal Rules of Criminal  
23 Procedure, any party may serve and file written objections within ten days after being served with  
24 a copy of this Report and Recommendation. Where the parties timely object to a Report and  
25 Recommendation, "[a] judge of the court shall make a de novo determination of those portions of

1 the [Report and Recommendation] or specified proposed findings or recommendations to which  
2 objection is made.” 28 U.S.C. § 636(b)(1). A district court may “accept, reject, or modify, in whole  
3 or in part, the findings or recommendations made by the magistrate judge.” *Id.* If specific objections  
4 are not timely filed, the party’s right to de novo review may be waived. *See United States v.*  
5 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

6 A review of the documents filed by Burkey purportedly objecting to the Report and  
7 Recommendation reveals that Burkey has not filed any specific objections to the Report and  
8 Recommendation. Title 28 U.S.C § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice  
9 require a party to file “*specific* written objections” to the Report and Recommendation. Rather,  
10 Burkey has copied and pasted his Motion to Dismiss and recast it as Objections to the Report and  
11 Recommendation. As such, there are no *specific* objections for the Court to address. Burkey has  
12 not specifically addressed where the Magistrate Judge steered wrong in her Report and  
13 Recommendation. Instead, Burkey has chosen to summarily rely on the previously filed arguments  
14 in his Motion to Dismiss. Burkey has not provided any new argument, new evidence, or new legal  
15 authority for why the Magistrate Judge’s findings and conclusions were improper or wrong. *See*  
16 *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988) (“Parties filing objections to a magistrate’s  
17 report and recommendation must specifically identify those findings objected to. Frivolous,  
18 conclusive, or general objections need not be considered by the district court.”). As the Report and  
19 Recommendation thoroughly and correctly discussed the relevant facts and law as to the  
20 constitutionality of SORNA, the Court AFFIRMS and ADOPTS the Report and Recommendation  
21 and DENIES the Motion to Dismiss. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th  
22 Cir. 2003) (holding that a court need not review any part of the R & R that was not the subject of a  
23 specific objection).

24 Congress created the position of magistrate judges to assist district courts in discharging the  
25 heavy workload of the federal judiciary. *See* 28 U.S.C. § 636; *Thomas v. Arn*, 474 U.S. 140, 152

(1985) (“The Act grew out of Congress’ desire to give district judges ‘additional assistance’ in dealing with a caseload that was increasing far more rapidly than the number of judgeships.”) (citation omitted). To this end, Congress expressly authorized district courts to refer matters to magistrate judges for hearing, report, and recommendation. If a party wishes to object to a specific aspect of the magistrate judge’s report or recommendation, then that party needs to point the district court’s attention to the relevant part of the magistrate judge’s report and recommendation that is in question. If a party, however, were able to invoke a district court’s de novo review by simply spitting out its initial motion to the district court, which motion has already been thoroughly considered by the magistrate judge, the purposes of the Federal Magistrate Act would be flouted. For this reason, numerous circuits have held that the failure to raise specific objections to a report and recommendation is no different than the failure to serve any objection at all. *See Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984) (stating that word-for-word review of magistrate’s report due to general objections would undermine judicial efficiency); *Lockert v. Faulkner*, 843 F.2d 1015, 1019 (7th Cir. 1988) (“Just as a complaint stating only ‘I complain’ states no claim, an objection stating only ‘I object’ preserves no issue for review.”); *Howard v. Sec. of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991) (“A general objection to the entirety of the magistrate’s report has the same effect as would a failure to object. The district court’s attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless.”); *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996) (adopting the rule of *Goney*, *Lockert*, and *Howard*).

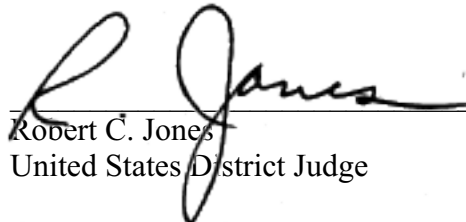
Furthermore, this Court has previously conducted a de novo review of the identical nine arguments that Burkey has raised in this case as to the constitutionality of SORNA. *See United States v. Benevento*, No. 2:07-cr-136-RCJ-PAL. In that case, the Court concluded that SORNA withstands the facial attacks made by Burkey here. (#86). Specifically, the Court made a de novo determination and accepted the Magistrate Judge’s conclusions that (1) Nevada’s failure to

1 implement a SORNA compliant registration system does not preclude prosecution for failing to  
2 register as a sex offender under SORNA; that (2) prosecution for a violation of 18 U.S.C. § 2250(a)  
3 does not deprive an offender of his due process rights to fair notice; (3) that SORNA is a valid  
4 exercise of Congress's Commerce Clause power; (4) that SORNA does not violate the Ex Post Facto  
5 Clause of the Constitution; (5) that SORNA does not violate the non-delegation doctrine; (6) that  
6 the Attorney General did not violate the Administrative Procedure Act when promulgating an interim  
7 rule without prior notice or comment; (7) that § 2250 does not violate the Tenth Amendment; and  
8 (8) SORNA does not violate an offender's right to interstate travel. At least one other judge from  
9 the District of Nevada, Judge Kent J. Dawson, has ruled identically. *See United States v. Morris*,  
10 2:08-cr-229-KJD-PAL.

### 11 CONCLUSION

12 IT IS HEREBY ORDERED that the Magistrate Judge's Report (#41) is AFFIRMED and  
13 ADOPTED and Burkey's Motion to Dismiss (#23) is DENIED.

14 Dated: June 8, 2009

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17 Robert C. Jones  
18 United States District Judge  
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